ACCUSPEC ELECTRONIC SERVICES, INC.,	:	IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
Plaintiff,	:	
v.	:	
CENTRAL TRANSPORT INTERNATIONAL, INC. and LOGISTICS PLUS, INC.,	:	C.A. No.: 03-394 E
Defendants	:	

PROPOSED POINTS FOR CHARGE

AND NOW, comes the Defendant, LOGISTICS PLUS, INC., by and through its attorney, W. JOHN KNOX, ESQ. of THE TRAVIS LAW FIRM, and files these Proposed Points for Charge. The following is stated in support thereof:

1. **1.42 (Civ) BURDEN OF PROOF AND PREPONDERANCE OF EVIDENCE**

The plaintiff is seeking damages in this case based upon a Federal law known as the Carmack Amendment. In civil cases such as this one, the plaintiff has the burden of proving those contentions that entitle it to relief. The plaintiff has the burden of proving its case by a preponderance of the evidence.

A fair preponderance of the evidence means you are persuaded that it is more probably accurate and true than not.

To put it another way, think, if you will, of the "scales of justice," which is really an ordinary balance scale, with a pan on each side. Onto one side of the scale, place all of the evidence favorable to the plaintiff; onto the other, place all of the evidence favorable to the defendant. If, after considering the comparable weight of the evidence, you feel that the scales tip, ever so slightly, in favor of the plaintiff, your verdict must be for the plaintiff. If the scales are equally balanced or tip in favor of the defendant, your verdict must be for the defendant.

2. **PLAINTIFF'S BURDEN**

In this case, the plaintiff has the burden of proving the carrier's negligence. It must do so by proving following: that the freight was delivered in good condition to the trucking company otherwise known as the "carrier"; the freight arrived to its destination in a damaged condition; and the amount of damage incurred. John Morrell & Co. v. Frozen Food Exp., Inc., 700 F.2d 256 (5th Cir. 1983); Frosty Land Foods International, Inc. v. Refrigerated Transport Co., Inc., 613 F.2d 1344 (5th Cir. 1980).

3. **STATUS OF PARTIES**

Under the Carmack Amendment, the shipper is only entitled to recover against the carrier that issued the bill of lading or the delivering carrier that physically drops the goods off at the final shipping destination or a freight forwarder. Either of these carriers will be liable for loss caused by any carrier during the trip. Tokio Marine & Fire Ins. Group v. J.J. Phoenix Exp., 156 F. Supp. 2d 889, 894 (N.D. Ill. 2001); 49 U.S.C. §14706(a)(1) and (2).

An party can only be determined to act as a freight forwarder if it holds itself out to the general public to provide transportation of property for compensation and in the ordinary course of its business (a) assembles and consolidates shipments; (b) assumes responsibility for the transportation from the place of receipt to the place of destination; (c) uses a carrier for any part of the transportation; and (d) contracted with the shipper or consignee at rates set by itself. 49 U.S.C. §13102(8).

A party that is an "agent-forwarder" or "broker" is not a freight forwarder. Rather, an agent forwarder or broker is a party other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation. 49 U.S.C. §13102(2). In other words, a party that merely brokers a sale for the shipment of an item of freight. Registration or admission as a broker, agent-forwarder or freight forwarder does not establish the party's true identity. To determine the status of the party, you should look to the relationships between each other. Phoenix Assurance Company v. K-Mart Corp., 977 F. Supp. 319, 326 (D.N.J. 1997).

If you determine that a party such as the defendant is an agent-forwarder or broker, the defendant cannot be held liable under the Carmack Amendment. Chubb Group of Insurance Companies v. H.A. Transp. Systems, Inc., 243 F. Supp.2d 1064 (C.D. Cal. 2002)

4. **DEFENDANT'S BURDEN**

If you believe that the plaintiff has proven the above elements establishing liability against the carrier, the carrier has the burden of proving that it was not negligent and that the loss or damage to the cargo was caused by an act of the shipper or plaintiff, an Act of God, act of public authority, act of public enemy, or the inherent nature or vice of the goods. Conair Corp. v. Old Dominion Freight Line, 22 F. 3d 529 (3d Cir. 1994)

5. **3.01 (Civ) NEGLIGENCE-DEFINITION**

The legal term "negligence," otherwise known as carelessness, is the absence of ordinary care that a reasonably prudent person would use in the circumstances presented here. Negligent conduct may consist either of an act or a failure to act when there is a duty to do so. In other words, negligence is the failure to do something that a reasonably careful person would do, or doing something that a reasonably would not do, in light of all the surrounding circumstances established by the evidence in this case. It is for you to determine how a reasonably careful person would act in these circumstances.

6. **3.02 (Civ) ORDINARY CARE-DEFINITION**

Ordinary care is the care a reasonably careful person would use under the circumstances presented in this case. It is the duty of every person to use ordinary care not only for his or her own safety and the protection of his or her property, but also to avoid injury to others. What constitutes ordinary care varies according to the particular circumstances and conditions existing then and there. The amount of care required by the law must be in keeping with the degree of danger involved.

7. **3.25 (Civ) FACTUAL CAUSE**

The plaintiff must prove to you that the defendant's conduct caused the plaintiff's damages. This is referred to as "factual cause." The question is: "Was the defendant's negligent conduct a factual cause in bringing about the plaintiff's damages?"

Conduct is a factual cause of harm when the harm would not have occurred absent the conduct. An act is a factual cause of an outcome if, in the absence of the act, the outcome would not have occurred.

In order for conduct of a party to be a factual cause, the conduct must not be fanciful or imaginary, but must have played a real role in causing harm or damage. Therefore, in determining factual cause, you must decide whether the negligent conduct of the defendant was more than an insignificant factor in bringing about any harm or damage to the plaintiff. Under Pennsylvania law, conduct can be found to be a contributing factor if the action or omission alleged to have caused the harm or damage was an actual, real factor, not a negligible, imaginary, or fanciful factor, or a factor having no connection or only an insignificant connection with the harm or damage. However, factual cause does not mean it is the only, primary, or even the most important factor in causing the harm or damage. A cause may be found to be a factual cause as long as it contributes to the harm or damage in a way that is not minimal or insignificant.

To be a contributing factor, the defendant's conduct need not be the only factor. The fact that some other cause concurs with the negligence of the defendant in producing harm or damage does not relieve the defendant from liability as long as her own negligence is a factual cause of the harm or damage.

8. **3.26 (Civ) CONCURRING CAUSES**

There may be more than one factual cause of the harm suffered by the plaintiff. When negligent conduct of two of more persons contributes concurrently to an occurrence or incident, each of these persons is fully responsible for the harm suffered by the plaintiff regardless of the relative extent to which each contributed to the harm. A cause is concurrent if it was operative at the moment of the incident, and acted with another cause as a factual cause in bringing about the harm.

10. **3.50 (Civ) VERDICT DIRECTING SUMMARY**

You will now retire to consider all of the evidence received in this trial in the light of the various factors I have presented to you and apply the law as I have given it to the fact as found by you.

If you find that the defendant was negligent, and that the defendant's conduct was a factual cause of the harm to the plaintiff, your verdict must be in favor of the plaintiff and against the defendant.

If you find that the defendant was not negligent, or that the defendant's negligence was not a substantial factor in bringing about harm to the plaintiff, your verdict must be for the defendant.

If your verdict is in favor of the plaintiff, you must then determine what damage the plaintiff was and will be caused to suffer by reason of the defendant's negligence and return a verdict for the plaintiff in that amount.

11. **5.30 (Civ) EXPERT(S) TESTIMONY-CREDIBILITY GENERALLY**

A witness who has special knowledge, skill, experience, training, or education in a particular science, profession, or occupation may give an opinion as an expert as to any matter in which he or she is skilled. In determining the weight to be given to the expert's opinion, you should consider the qualifications and reliability of the expert and the reasons and facts given for the opinion. You are not bound by an expert's opinion merely because he or she in a expert; you may accept or reject it, as in the case of other witnesses. Give it the weight, if any, to which you deem it entitled.

12. **5.33 (Civ) WEIGHING CONFLICTING EXPERT TESTIMONY**

In resolving any conflict that may exist in the testimony of expert witnesses, you are entitled to weight the opinion of one expert against that of another. In doing this, you should consider the relative qualifications and reliability of the expert witnesses, as well as the reasons for each opinion and the facts and other matters upon which it was based.

13. **5.50 (Civ) BURDEN OF PROOF**

In civil cases such as this one, the plaintiff has the burden of proving those contentions that entitle him or her to relief.

When a party has the burden of proof on a particular issue, the party's contention on that issue must be established by a fair preponderance of the evidence. The evidence establishes a contention by a fair preponderance of the evidence if you are persuaded that it is more probably accurate and true than not.

To put it another way, think, if you will, of an ordinary balance scale, with a pan on each side. Onto one side of the scale, place all of the evidence favorable to the plaintiff; onto the other, place all of the evidence favorable to the defendant. If, after considering the comparable weight of the evidence, you feel that the scales tip, ever so slightly or to the slightest degree, in favor of the plaintiff, your verdict must be for the plaintiff. If the scales tip in favor of the defendant, or are equally balanced, your verdict must be for the defendant.

In this case, the plaintiff has the burden of proving the following propositions: that the defendant was negligent, and that the defendant's negligence was a factual cause in bringing about the accident.

14. **DAMAGES**

If you find that the defendant is liable to the plaintiff, you may determine that the plaintiff has sustained general damages, or those reasonably foreseeable to a reasonable person.

Such damages are recoverable. Special or consequential damages, those that are not reasonably foreseeable are not recoverable. Oritani Savings & Loan Ass'n. v. Fidelity & Deposit Co., 744 F. Supp. 1311, 1322 (D.N.J. 1990).

WHEREFORE, the Defendant, Logistics Plus, Inc., respectfully requests this Honorable Court to charge the jury of the within proposed points for charge.

Respectfully Submitted,

THE TRAVIS LAW FIRM

By______________________

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Attorneys for Defendant

CERTIFICATE OF SERVICE
I hereby certify that a copy of this document was served upon the U.S. District Court and all counsel of record by First Class United States Mail, Fax or by Hand Delivery/Courthouse Box on this 14th day of October, 2005.

DATED: 10/14/05